

DISTRICT OF MAINE

Defendant

Docket No. 96-255-P-H

licensed to do business and sell insurance in the State of Maine. When the complaint was served on him, the defendant was a resident of Saco, Maine. The defendant was responsible for administration of the plans from their inception.

3. The defendant failed to amend the plans as required by the Tax Equity and Fiscal Responsibility Act of 1982, the Deficit Reduction Act of 1984, the Retirement Equity Act of 1984 and the Tax Reform Act of 1986.

4. The defendant failed to submit annual reports for the plans, known as Internal Revenue Service Form 5500, to the Internal Revenue Service and the Department of Labor as required for plan years 1992-1995.

5. On May 3, May 11, July 31, September 12 and October 4, 1995, E. Perry Iron & Metal Co., Inc. requested plan documents from the defendant, who failed to provide any documents in response to the requests.

6. The failure to file amendments and annual reports exposes the plans to substantial penalties that may be imposed by the Internal Revenue Service and the Department of Labor.

7. E. Perry Iron & Metal Co., Inc. has paid for professional services to address the problems caused by the defendant's failure to carry out his fiduciary duties to the plans. The providers of these services include Fortin & Howgate; the law firm of Lambert, Coffin, Rudman & Hochman (formerly Black, Lambert, Coffin & Rudman); the law firm of Wakelin, Hallock & O'Donovan (formerly D. S. Wakelin & Associates); Sheakley Pension Administration; the law firm of Tompkins, Clough, Hirshon & Langer; and Benefit Plan Pros, Inc.

8. The total cost to E. Perry Iron & Metal Co., Inc. to date for these services is \$27,083.07. E. Perry Iron & Metal Co., Inc. continues to incur fees for professional services to address

compliance problems associated with the plans as a result of the failures of the defendant.

9. The amount of penalties to be paid by E. Perry Iron & Metal Co., Inc. as a result of the failure of the defendant to comply with statutory and regulatory requirements applicable to the plans has not yet been determined.

10. A plan administrator who fails to comply with a request for information which he is required by ERISA to furnish to a participant within 30 days after a such a request is made may in the court's discretion be personally liable to the participant in the amount of up to \$100 per day from the date of such failure. 29 U.S.C. § 1132(c)(1).

11. The amended complaint provides the dates upon which demand was made of the defendant for copies of plan documents by E. Perry Iron & Metal Co., Inc. — which cannot be a participant in either plan, 29 U.S.C. § 1002(7), and which is not alleged to be a beneficiary of either plan — but provides no dates upon which demands were made upon the defendant by the individual plaintiffs, who are participants in the plans, for plan information that the defendant was obligated to supply pursuant to 29 U.S.C. § 1021(a). *See also* 29 U.S.C. §§ 1024(b)(4) & 1025(a).

12. Counsel for the plaintiffs requested at the damages hearing that the penalty available under 29 U.S.C. § 1132(c)(1) be assessed from a date 30 days after the filing of the complaint in this action, a date which appears conservative and eminently reasonable in light of the complaint's failure to specify the date or dates upon which the individual plaintiffs made their requests for information or documents. Six hundred twenty-one days have passed since September 15, 1996, the date that is 30 days after the date upon which the complaint was filed.

13. The defendant may, in the court's discretion, be personally liable to the plaintiffs, as participants in the plans, pursuant to 29 U.S.C. § 1132(c)(1), in an amount up to \$200 per day (\$100

for each plan) since the complaint was filed. I conclude that imposition of the maximum penalty is appropriate in the circumstances which include the defendant's abject failure to respond to any of the plaintiffs' or the corporation's requests for information, his failure to prepare and file required plan amendments and annual reports and the consequences thereof. *See Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588 (1st Cir. 1993).

14. The plaintiffs are entitled to the injunctive relief sought in their First Amended Complaint, ordering the defendant to return all documents in his possession relating in any way to the plans.

15. The plaintiffs are entitled to recover any penalties assessed against the plans resulting from the actions or failures to act of the defendant, although as of the damages hearing date no such assessment had been made.

On the basis of the foregoing, I recommend that the plaintiffs be awarded damages in the amount of \$27,083.07, civil penalties under 29 U.S.C. § 1132(c)(1) in the amount of \$124,200, and injunctive relief as set forth above against the defendant, and that judgment be entered for the plaintiffs against the defendant in the amount of \$151,283.07.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 29th day of May, 1998.

David M. Cohen
United States Magistrate Judge